Clarification on the Definition of "Son or Daughter" in Relation to the FMLA
by Laura Bailey Gallagher, Esq.

On June 22, 2010, the Wage and Hour Division of the Department of Labor issued Administrator's Interpretation ("letter") No. 2010-13 clarifying the definition of "son or daughter" under the Family Medical Leave Act ("FMLA") as the term applies when there is no legal or biological parent-child relationship, i.e., where an employee is standing in loco parentis to a child.

This new guidance states that even if a person has no biological or legal relationship with a child, the person may be eligible for unpaid FMLA leave for: (1) the birth or placement of a child; (2) leave to bond with a child within the first 12 months following birth or placement; or (3) to care for a son or daughter with a serious health condition.

In determining whether an employee is eligible for FMLA leave, the employer may require the employee to provide reasonable documentation or statement of a family relationship. A simple statement asserting that the requisite family relationship exists, however, is all that is needed in situations where there is no legal or biological relationship.

The employee, who intends to assume the responsibilities of a parent, need not establish that he or she provides both day-to-day care and financial support in order to be eligible for FMLA leave; providing either day-to-day care or financial support may establish an in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child. In all cases, however, whether an employee stands in loco parentis to a child will ultimately depend on the particular facts.

For example, where an employee provides day-to-day care for an unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered to stand in loco parentis to the child and therefore entitled to FMLA leave to care for the child if the child had a serious health condition.

The same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement. For instance, an employee who will share equally in the raising of a child with the child's biological parent would be entitled to leave for the child's birth because he or she will stand in loco parentis to the child. Similarly, an employee who will share equally in the raising of an adopted child with a same sex partner, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following

placement, or to care for the child if the child had a serious health condition, because the employee stands in loco parentis to the child.

Just because a child has a biological parent in the home or has both a mother and father, does not prevent a finding that the child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child for purposes of taking FMLA leave.

This guidance makes it clear that unmarried and same-sex partners may be eligible for FMLA leave to care for a son or daughter where the employee stands in loco parentis to the child.

In closing, we encourage you to pass this information along to other departments as appropriate. To obtain a copy of Administrator's Interpretation No. 2010-3 go to http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf or feel free to contact us for more information.